Department of Foreign Affairs and International Trade

Ministère des Affaires étrangères et du Commerce international

CANADA

TRADE IN TELECOMMUNICATIONS SERVICES:

THE RESULTS OF THE WTO AGREEMENT ON BASIC TELECOMMUNICATIONS

by

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The 1998-1999 Norman Robertson Fellow

The Trade and Economic Analysis Division (EET)
Department of Foreign Affairs and International Trade

April 1999

Reference Document No. 10

100-03728/

The Department of Foreign Affairs
and International Trade

REFERENCE DOCUMENT
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Trade in Telecommunications Services: The Results of the WTO Agreement on Basic Telecommunications, by Chantal Blouin, Government of Canada© (Department of Foreign Affairs and International Trade Canada) 1999. The views expressed are those of the author and not necessarily those of the Government of Canada. Comments or enquiries should be addressed to the author.

Cat. No. E73-16/10-1999E

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Introduction

The inclusion of services in the multilateral trade regime was recognized as an important achievement of the Uruguay Round. Up to recently, services were not even seen as being tradable. Through the gradual evolution of how services are envisioned, it became internationally accepted to include them into the regime for international trade. The General Agreement for Trade in Services (GATS) was the result of this new understanding. However, the commitments taken by the World Trade Organization's (WTO) members in the Uruguay Round regarding services were limited to specific sectors and mode of delivery of these services. One of the sectors where no commitments were taken by the end of the Uruguay Round was basic telecommunications services.

Telecommunication services markets presented some unique features which made them less prone to competition than other services sectors. First, the domestic markets were, in most cases, completely dominated by a national monopoly. This single provider was often owned by the State, which created worries about the independence of the domestic regulator. The legacy of a monopolistic market structure was also a subject of concerns. It was feared that the incumbents (the suppliers who were the monopoly providers prior to liberalization) would have an unfair advantage compared to the new entrants. One of the incumbents' strategic advantage is their control of the existing networks of communications. Most new entrants need to connect to this network to offer their services. By refusing access to this network or by asking unreasonable charges for access, the incumbents can keep potential competitors at bay.

Despite these concerns and given the importance of this sector as an industry and an infrastructure enabling other types of trade, negotiations continued and an agreement was finally reached in 1997 to place telecommunications services under the GATS, according to the specific commitments of each country. The Agreement on Basic Telecommunications (ABT) reached February 15, 1997 by members of the World Trade Organization's (WTO) sets new rules concerning trade in telecommunications services.[1]

[1] Trade in telecommunications services takes two main forms: cross-border supply and commercial presence. Cross-border trade is the most important mode of international transactions in telecommunications services. It consists in international telephone calls, i.e. the placement of a call in a home market which is terminated in a foreign market. In 1995, these services generated 52,8 billion US$ in retail revenues (8,7% of the global telecommunications services market). The second form of telecommunications services trade is through foreign investment to establish a commercial presence. Until recently, this form of trade was very restricted because the provision of telecommunications services in most countries was the responsibility of one single organization which was entirely State-owned.

This report discusses the consequences of this new agreement. The first section describe the ABT and the Reference Paper on regulatory principles which accompanied it. The second section provides an evaluation of the strengths and weaknesses of ABT. Can it be a model for other sectors? The third section raises a number of questions for future negotiations on telecommunications services. One of these questions is to what extent the ABT has been implemented. Therefore, the remaining part of the report evaluates whether the legislation and regulation regarding telecommunication services in Canada, the United States, the EU and Japan are in agreement with the principles set in the Reference Paper. The enforcement of these principles by national regulatory agencies will also be scrutinized.

1. The WTO's Agreement on Basic Telecommunications

Negotiations on telecommunications services officially began under the auspices of the GATT in 1986 during the Uruguay Round, but the three first years were centred on creating an outline of a general agreement on services. In 1994, at the end of the round, no agreement on basic telecommunications was reached, [2] but a General Agreement on Trade in Services (GATS) was concluded.[3] This agreement set the general framework within which discussions on telecommunications would take place. The GATS calls on WTO Members to observe 14 general obligations such as the most-favourable-nation (MFN) treatment and regulatory transparency.[4] In addition to the general obligations, the GATS takes the form of national schedules of commitments. The schedules are usually organized on a sectoral basis, even though horizontal commitments are also possible. These commitments can be made on market access or national treatment disciplines with respect to four modes of supply. In the Uruguay Round, several countries took specific market-access and national treatment commitments in the value-added telecommunications services (transmissions which include some data processing), but not on basic telecommunications. Consequently, a Negotiating Group on Basic Telecommunications (NGBT) was created at the end of the Uruguay Round to continue discussions on this topic with the objective of reaching an agreement in 1996. These negotiations broke down as the United States claimed that a critical mass of market-access commitments was not reached. Members nevertheless agreed to further extend the negotiations and in February 1997, an Agreement on Basic Telecommunications was finally concluded.

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[2] Negotiations were formally concluded at the Ministerial Meeting held in April 1994 in Marrakesh, Morocco. The Final Act embodying its results came into force on 1 January 1995.

[3] An Annex on Telecommunications was attached to the GATS. This annex aimed at ensuring that suppliers of various services have access to the telecommunications networks of the country where they are conducting business.

[4] For general information on GATS, see Bernard Hoeckman and Michel Kostecki, The Political Economy of the World Trading System: From GATT to WTO, Oxford, Oxford University Press, 1995.

This agreement included 55 schedules of specific commitments (accounting for 69 countries, the EU presenting a single schedule) regarding market-access and national treatment of foreign telecommunications services providers.[5] Members could specify which segments of the telecommunications services sector they wish to open to foreign competition (local or long-distance services, international calls, mobile telephony). Except for Turkey, members of the OECD liberalized all segments of the telecommunications services sector.[6]

Moreover, almost all the signatories to the ABT included additional commitments concerning regulatory principles in their schedules. These regulatory principles are presented in the Reference Paper, a short document negotiated in 1996. Most Members took binding commitments on these regulatory principles by including the Reference Paper in their schedule of commitments (in the additional commitments section). [7]

The Reference Paper (RP) aimed to address the issues we mentioned in the introduction of dominance of the incumbents and to ensure that competitive conditions are created. Indeed, the lifting of the formal barriers to entry is not sufficient to ensure actual market access, given the strength of the traditional national operators in their domestic market and their control over essential facilities such as the local telecommunications network. In telecommunications services, the historical market structure has been a monopolistic one. Whether owned by the State or by private interests, the national monopoly was responsible for the provision of all telecommunications services. Even after the introduction of competition, the problem of the dominance of the "incumbent" remains.

Several OECD countries (Australia, New Zealand, Japan, United Kingdom, United States) lifted the legal and regulatory barriers for domestic entrants in telecommunications services markets in the 1980s and 1990s.[8] Similarly, Canada opened its long-distance telephone market to domestic competition in 1992 and its local market in 1997. These early experiences with competition, even though considered successful in terms of their effect on price and quality, confirmed that given the market power of the incumbents, there was a need for special safeguards in order to create conditions for actual competition.

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[5] Basic telecommunications are now included in the commitments of 83 WTO Members. This figure comprises the 69 participants in the Fourth Protocol on basic telecommunications, the 4 Members who have subsequently submitted schedules on basic telecoms, 2 recently acceded countries whose commitments resemble those in the Fourth Protocol, and 8 Members that included some basic services in their Uruguay Round schedules.

[6] Marco Bronkers and Pierre Larouche, "Telecommunications Services and the World Trade Organization", Journal of World Trade, 1997.

[7] Marco Bronkers and Pierre Larouche, "Telecommunications Services and the World Trade Organization", Journal of World Trade, 1997.

[8] Marco Bronkers and Pierre Larouche, "Telecommunications Services and the World Trade Organization", Journal of World Trade, 1997.

The goal of the Reference Paper (RP) is to create these conditions. The document has five main sections. It first deals with the prevention of **anticompetitive behaviour** such as cross-subsidization, the use of information obtained by competitors and the withholding of technical or commercial information. "Anticompetitive cross-subsidization" refers to the practice of charging high prices for one service and using these surpluses to pay for other services, which are priced under cost. One possible antitrust problem is that the incumbent can overcharge customers for services over which it still has a *de facto* monopoly, such as local residential service, in order to cut rates in competitive markets.

The second element of the RP is **interconnection.** This is the core of the RP because most new entrants cannot build their own complete telecommunications network at once, given the need for prohibitively large capital investments. Hence, they need to lease part of the incumbent's network to be able to provide their services. Moreover, the new entrants' customers have to be connected with incumbents' clients so that everybody on the network can communicate (network externality). The RP specifies that interconnection with the major supplier should be provided:

- at any technically feasible point in the network,
- under nondiscriminatory, transparent and reasonable terms and rates and the quality of the service should be "no less favourable" than the service provided to subsidiaries,
- in timely fashion,
- at cost-oriented rates.
- and sufficiently unbundled.

The procedures of the negotiations and the interconnection arrangements between the major supplier and the new entrants must be public and transparent. An independent body must resolve disputes, if negotiations are not successful.

The third section of the RP requires that **universal service** obligations be administered in a transparent, nondiscriminatory and competitively neutral manner. Fourthly, the document includes commitments on the **licensing** process. . If a license is required to provide telecommunications services, the criteria, terms and conditions of individuals licenses must be public. Reasons for denial of a license must be provided.

Finally, the signatories of the RP committed themselves to ensure **the independence of the regulatory body.** Indeed, in many WTO countries where the provision of telephone service was the sole responsibility of the State, there was no separate body responsibie for regulating prices or supervising practices. The United States's Federal Communications Commission (FCC) and the Canadian Radio and Telecommunications Commission (CRTC) were some of the rare independent regulators of telecommunications before the 1990s. With the coming of competition, the new entrants need to know that the rules of the game will be applied and enforced by an impartial referee and not an organization which is part of, or related to, the dominant telecommunications provider. Therefore, the RP stipulates that "the regulatory body

is separate from, and not accountable to, any supplier of basic telecommunications services. The decisions of and the procedures used by regulators shall be impartial with respect to all market participants."

2. An Evaluation of the ABT

What is the significant of the Agreement on Basic Telecommunications and the Reference Paper? What did it really achieve? Should, the sectoral approach used for telecommunications services serve as a model? These are the kind of questions this section will address.

Skeptics would stress that most of the commitments taken as a result of the negotiations on basic telecommunications are *standstill commitments*, i.e. they consist in binding liberalizing measures that have already been adopted at the national or regional level.[9] This is especially true for the industrialized countries. As we noted earlier, Canada, the United States and the European Union had already ended, or taking formal engagements to end exclusive rights in telecommunications services and open the sector to competition. Moreover, domestic regulations to support this move to greater competition were already adopted or under way. In fact, one can argue that WTO commitments in services in general are only binding liberalization initiatives which were already in place at the national or regional level. One could even point out that international agreements generally lag behind domestic policy.

However, if one adopts a more optimistic view of the ABT, one has to stress that a binding commitment to keep a sector open to foreign competition provides certainty and predictability that domestic liberalization alone cannot give to investors and suppliers. Moreover, as the parties to the agreement took binding commitments regarding telecommunications services, the sector is now subject to a multilateral dispute settlement process, the WTO's Dispute Settlement Understand (DSU).

Another important aspect of the agreement on telecommunications is that it took in account the importance of *domestic regulation* and of private actors' practices in its application of liberalization. The agreement acknowledges that liberalization requires more than "border measures," such as the reduction or elimination of tariffs. "Internal measures" are now considered potential barriers to trade and regulatory policies in particular have been subjected to greater scrutiny. Regulatory measures can impede market access in many ways, even if regulation is applied in a nondiscriminatory manner to domestic and foreign firms. The clearest

[9] See Eli Noam, "Assessing the WTO Agreement on Basic Telecommunications", in Gary Clyde Hufbauer and Erika Wada (eds), Unfinished Business: Telecommunications after the Uruguay Round, Washington, Institute for International Economics, 1997. He also points to the limits on foreign investment commitments that one find in the Agreement on Basic telecommunications and the delays on the implementation demanded by many developing countries as examples of the limitations of the ABT.

examples of such barriers to entry are regulations which restrict the provision of a good or service to a single supplier. The granting of the monopoly does not violate the national treatment principle since it applies to foreign and domestic firms alike, but prevents any provider from entering the market. Similarly, a schedule of commitments which allow very good access to a national market is not very valuable if the domestic dominant carrier engages in practices which prevent competitors from entering.

Therefore, the adoption of the regulatory principles of the Reference Paper by the vast majority of the ABT signatories is an important achievement. Its objective is to prevent situations where market access commitments could be nullified by domestic regulation such as an unclear licencing regime or weak interconnection rights. The ABT not only created a precedent as the first successful sectoral multilateral negotiation, it was also part of a new trend of recognizing that "internal measures" such as domestic regulations can constitute barriers to trade. The agreements on intellectual property (TRIPS) and health and safety measures (SPS) preceded the Reference Paper in that regard.

It is important to understand the nature of the regulatory principles put forward in that Reference Paper. The document does not oblige the signatories to adopt one single set of regulation regarding telecommunications services. Rather, it provides general principles to guide domestic policies. Even though, in practice, it will make regulatory requirements and governmental policies of different jurisdictions more similar and will result in a certain amount of policy convergence, it remains that the objective is only to provide guidelines to respect. For example, national policymakers are free to adopt a variety of criteria in the granting of licences, as long as they are public and transparent. Similarly, a country is free to establish a universal service system to ensure that everybody has access to the telecommunication network, as long as it is transparent and non-discriminatory. The ABT is also agnostic regarding public ownership: in countries where the monopoly providers were state-owned, national policymakers do not have to privatise the incumbent to respect their commitments.

This approach to regulatory measures aims at striking a balance between two objectives: international market openness and national sovereignty. By trying to accommodate differences instead of attempting to harmonize them away, the trade rules for telecommunications services regulation respect the compromise at the heart of the trade regime, the compromise between trade liberalization and state sovereignty.[10]

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[10]Robert Wolfe, "Reconstructing Domestic Regulation in the Trade Regime", Prepared for delivery to the International Studies Association, Washington DC, February 19, 1999, p.1.
"Incompatible domestic regulations may undermine international openness, but pressures of homogenization undermine political communities. Globalization and trade liberalization now challenge state regulation, or regulation responds to the pressure of globalization, in such domains as health, safety,transportation, communications, banking, insurance, workers' rights, culture and the environment. These challenges to domestic regulators, and their response, are new in *content*, but not in *form*. This process is the one Polanyi described as the double movement - an expansion of the role of the market meets a social response".

Despite the positive elements of the adoption of the Reference Paper on regulatory principles, one could argue that a *horizontal approach* to these questions would be a better strategy. In addition to broader coverage, such approach would allow a more coherent perspective on how competition policy and regulatory policy relate to trade policy.[11] Nevertheless, the sectoral approach adopted for telecommunications presents some clear benefits. It allows Members to craft agreements which deal with the issues that are unique to that sector. For instance, in telecommunications services, specific anticompetitive practices have been targeted: cross-subsidization or retaining technical and commercial information which is necessary to the new entrant. The issue of interconnection was also directly dealt within a sectoral agreement, whereas a horizontal approach would not have allowed that kind of detail. The result is that Members know more precisely what they are committing to and it provides more specific language for a panel to base its analysis, if a Member resort to the dispute settlement process. The sectoral approach may also be the only feasible one for the time being. To include competition policy and domestic regulation in the multilateral trade agreements can be seen as an important encroachment to national sovereignty by many WTO members.

One weakness that has been raised by lawyers about the regulatory principles in the ABT is that they lack precision. They argue that many of the concepts used in the text are vague. For example, the fact that the central notion of " major supplier" is defined in very general terms in the Reference Paper casts some doubt over the capacity of the document to create enforceable safeguards against anti-competitive behaviours.[12] (A major supplier is defined as a supplier that has material effect on price or quantity by virtue of controlling an essential facility or using its market position.) The Reference Paper identifies cross-subsidization as an anti-competitive practice. Bronkers and Larouche emphasize that it is difficult to monitor this cross-subsidization, as it demands the implementation of strict accounting, reporting, auditing and disclosure systems, which are not included in the RP. Other examples of the level of generality of the RP can be found in the section on universal service and in the provisions concerning licensing. "The RP does not attempt to define the situations in which a licence can be required, neither outline the terms and conditions which should or should not be found in a licence."[13] Moreover, one can ask if we need to specify benchmarks for elements like the delays for licensing decisions or interconnection fees or make the notion of "interconnection at any feasible point" clearer.

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[11] A WTO working party has already been created to explore the relationships between trade and competition policy.

[12] Marco Bronkers and Pierre Larouche, "Telecommunications Services and the World Trade Organization", Journal of World Trade, 1997.

[13] Idem.

The question of the lack of precision can be seen in the legal perspective: it is difficult to enforce vague rules. On the other hand, one could praise the degree of regulatory flexibility granted by such broad definitions. As discussed earlier, trade agreements have to accommodate differences in domestic regulation, in order to respect sovereign states' right to create national rules, while attempting to limit the range of divergence, to limit the negative consequences for international trade. The debate about modifying the content of the Reference Paper on regulatory principles will have to take this tension into consideration.

Apart from its Reference Paper, one could also note that the Agreement on Basic Telecommunications improved the situation which existed up to now in telecommunications services in many ways. First, a detailed examination of the schedules of commitments points out the number of rollback commitments undertaken by the signatories.[14] For example, even though the European Union had already planned to allow competition in telecommunications services on January 1st 1998, "EU members were under no obligation to extend market access privileges to non-EU members, nor were they subject to any penalty should they treat non-EU carriers in a discriminatory manner. Through the 1997 WTO commitments, the EU made a binding commitment to extend its current internal level of market access to non-EU service providers."[15]

Taking a broader perspective, one could argue that the ABT, as well as the Information Technology Agreement (ITA) concluded in 1997 which eliminates all tariffs on information technology equipment, are even more crucial than trade agreements in other sectors, given the centrality of information and communications technologies for the current economic growth. Indeed, some economists analysed the consecutive periods of economic growth and identified information technologies as the engine of the current "techno-economic paradigm."[16] Indeed, according to their views, each growth period is fuelled by a core technology which has great potential for multiple applications, innovations and increased productivity. The previous period (from 1930s to 1980s) was based on cheap and abundant energy, especially oil. The new mode of growth is based on the multiple possibility of microchips. Allowing competition in the provision of telecommunications services could be seen as taking full advantage of the new technology-based growth as well as facilitating the diffusion of its benefits.

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[14] United Sates International Trade Commission(USTIC), Recent Trends in U.S. Services Trade: 1998 Annual Report, Investigation no.332-345, chapter 4.

[15] Ibid, P4-42.

[16] "Some changes in technology systems are so far-reaching in their effects that they have a major influence on the entire economy. A change of this kind carries with it many clusters of radical and incremental innovations, and may eventually embody a number of new technology systems. A vital characteristic of this type of technical change is that it has *pervasive* effects throughout the economy, i.e. it not only leads to the emergence of a new range of products, services, systems and industries in its own rights; it also affects directly or indirectly almost every other branch of the economy". Christopher Freeman and Carlota Perez, "Structural crises of adjustment, business cycles and investment behavior". p.47.

3. What is next?

The General Agreement on Trade in Services (GATS) mandates the beginning of negotiations to further liberalize services five years after its entry into force. Therefore, WTO negotiations schedule to begin in 2000 will include trade in services and it is necessary to define what the Canadian interests are in anticipation of those negotiations. This section will explore some of the main issues in telecommunications services for future negotiations.

3.1 Accounting rates system reform

We mentioned earlier that trade in telecommunications services can take two forms: cross-border supply and commercial presence. The ABT and its regulatory principles mostly deal with the latter. The agreement focuses on ensuring that new competitors, whether they are owned by domestic or foreign interests, will be able to enter and participate in the domestic market. Given the special features of the telecommunications industry, measures concerning interconnection and anticompetitive behaviours were included in the multilateral accord.

However, the Agreement on Basic Telecommunications does little to modify the situation regarding the other mode of supply, i.e. cross-border trade of telecommunications services. The central element in this form of trade, the accounting rate system for international communications, has not been directly affected by the ABT. In this section, problems with the current accounting rate system and potential scenarios for their resolution will be addressed.[17]

What is the accounting rate system? When an individual from country A (ex: Canada) is calling somebody in another country B (ex: France), the Canadian telephone company must pay the French telephone company to terminate the call. The amount paid is negotiated bilaterally; the two carriers agree on accounting rates, half of which becomes the fee charged for terminating the call (the settlement rate). The retail price billed to the Canadian customer by the Canadian telephone carrier is set unilaterally and is often named the collection rate. This system is not subjected to the most-favoured-nation rule governing international trade; settlement rates were left out of the WTO negotiations on telecommunications.[18] Therefore, a carrier can charge various rates to foreign carriers to terminate their calls.

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[17] This discussion is based on the following articles and books:
-Mark Scanlan, "why is the international accounting rate system in terminal decline, and what might be the consequences", Telecommunications Plicy, vol.20, no.10, 1996.
-Martin Cave and Len Waverman, "The future of in ternational settelments", Telecommunications Policy, vol. 22, on 1 1998.
-Peter Cowhey, " FCC benchmarks and the reform of the international telecommunications market", Telecommunications Policy, vol.22, no.11, 1998.
-Len Waverman, The Political Economy of In ternational Communications, Chapter 1, Washington, EPI Press forthcoming.

[18] It was agreed to exclude accounting rates until the agreement was reviewed in the year 2000.

Two main issues have been raised concerning this bilateral system. The first problem consists in the gap between the accounting rates and the costs of providing the service. Indeed, it is argued that the accounting rates are excessively above the costs involved in the operation international facilities and the completion of these calls. With the implementation of new transmission technologies, the costs for international communications have plummeted, and will continue to drop as the capacity for transmission has surged. However, the settlement rates did not decrease as much as the costs. Some statistics from the FCC illustrate the gap. The average settlement rate paid by US carriers to terminate their international calls is 39 cents/minute, going over 60 cents/minute if one excludes the OECD countries. The FCC calculated that the cost of termination is between five and 10 cents/minutes.[19] The result of these high settlement rates is overpriced prices for international communications, and an inefficient distribution of resources.[20]

The second challenge to the bilateral system created in a world of domestic telecommunications monopolies is the coming of various forms of competition. Competition can take place between the originating and the terminating operators. The interlocutors can prearrange to originate the call from the country with the lower collection rates or use call-back services which allow a customer to reverse the direction of the call. This situation can have two effects. The country with high collection rates loses so much traffic that it seeks to outlaw call-back services. Or, the same country may be able to compensate for the loss of out coming traffic with revenues from the settlement rate for the increased incoming calls.

Another practice which introduces competition in the monopolistic regime of international telecommunications is "least accounting rate routing." Given the important variations among settlement rates, traffic from country A to B could be routed via C in order to benefit from the lower combination of settlement rates. Another important practice is simply to bypass the accounting rate system with International Simple Resale (ISR). Traffic is transported over an international private leased circuit and breaks out directly onto the public network at the other end. For example, " an US bank operating in the UK will make calls on its private network from offices in the US to the UK where the call is privately switched by the bank's PABX (private automatic branch exchange) and sent for local interconnection with the British Telecom network as if it originated as a private network call in the UK."[21] Two-way ISR, when the call has access to the public network at both ends, is a real threat to the accounting rates and countries with net settlement payments have opposed it.[22]

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[19] J. Lande and L. Blake, Trends in the US International Telecommunications Industry, Industry Analysis Division, Common Carrier Bureau, FCC, June 1997.

[20] Waverman's (forthcoming) study of the American international telephone market suggests that high prices are also a consequence of the high profit margins of the domestic carriers.

[21] Scanlan, 1996, p.744.

[22] Even countries without net settlement payments have been cautious. "Liberalizing countries such as the US are concerned that, if they unilaterally permit ISR, they may find themselves in a situation in which incoming traffic bypasses the accounting rate system, while outgoing traffic is subject to it. For this reason, they have confine ISR to countries which offer reciprocal arrangements."Cave and Waverman, 1998, p.887.

Finally, in several countries, competition in the provision of international telecommunications is allowed. However, the entry of competitors in a system where in many countries telecommunications services are provided by one supplier can cause some problems. The monopoly provider in one country negotiating with a number of providers in another "has the capacity to extract rents at both ends by competitive bargaining. It would offer to terminate all its traffic with the competitor which was willing to agree to the lowest termination charge. The resulting competitive bidding process (known as "whipsawing") would drive the rate down, while the monopolist would be able itself to charge a higher rate."[23] Regulators in countries with many competitors such as the American regulator adopted some rules to deal with this risks (parallel accounting and proportionate return).

The new technologies and practices weaken the basis of the accounting rate system. Moreover, the high settlement rates and the high collection rates, in spite of the decrease in the costs of providing international telecommunications, are detrimental to all national economies. International telecommunications is and will be increasingly important in the global economy. In particular, multinational firms need to be in contact with their offices and branches scattered around the globe and communications can become an excessively large part of their budget, if the rates are well above costs. Therefore, the need for reform is emphasized by many analysts.

The reform of the accounting rate regime can take many forms. In the case of countries with significant bargaining power, an option for reform is to take unilateral action. The United States has adopted this strategy. The FCC has ordered American carriers to lower the amount of money they pay foreign carriers to terminate their international calls (lower the settlement rates). These rates are still negotiated on a bilateral basis between the two carriers but must not exceed the benchmarks set by the FCC.

A second option is to abandon the bilateral system and to create a multilateral regime based on the principles of transparency, nondiscrimination and national treatment. This new system would be negotiated within and ruled by the WTO's framework. In the present bilateral system, the termination charges demanded to foreign carriers are, in most cases, not publicly available, not cost-based, and can be discriminatory. In the new regime, the termination charges would be publicly available, cost-based and nondiscriminatory (equivalent charges for equivalent services). Waverman (1999) proposes that the termination charges include three elements: 1) a charge for the international facilities (satellite or cable), 2) a charge for the gateway, and, 3) a charge for transporting the call from the gateway to the interlocutor. This charge could be similar to the one imposed on carriers for terminating domestic calls (interconnection charge).

Multilateral discussions have been taken place at the ITU, but were not, up to now, successful. The results of negotiations on accounting rates are important, but not crucial for Canadian telecommunications companies. Indeed, 80% of Canadian international communications traffic is with the United States and the rates charged by U.S. carriers to

[23] Cave and Waverman, 1998, p.886.

terminate traffic are not overpriced, but cost-oriented (10 cents a minute in 1998). Nevertheless, to bring international telecommunications more fully within the new multilateral regime, it is important to complete the transition toward a multilateral rule-based framework for telecommunications services.

The adoption of the ABT represents a decisive shift in the international telecommunications regime.[24] The previous regime "rested on the principle that monopolies of services and equipment were the most efficient and equitable way of providing public service both domestically and internationally."[25] The new regime is based on different premises: competitive markets in the provision of telecommunications services are now considered possible and desirable. The institutional structure of the regime has also changed. The adoption of the ABT also underlined the shift in the locus of multilateral initiatives in telecommunications services from the International Telecommunications Union (ITU) to the WTO. The major economic issues are now debated in the WTO. Nonetheless, the ITU remains an important institution for technical issues such as standardization or frequency spectrum allocation.

3.2 Deepening of the commitments

In addition to the issue of domestic termination of international communications, future negotiations on telecommunications services could aim at broadening the level of commitments by Members. Many members have taken no or very limited commitments in telecommunications so far. For instance, sixty-nine countries were signatories to the Agreement on Basic Telecommunications in 1997. What are Canadian interests for expanding this group? Should we focus on particular countries or regions? Once Canadian preferences are established, one has to evaluate the available strategies. Insistence that the accession offers from potential members include good telecommunications services commitments is one strategy. Another one is to persuade current members to join the ABT by providing them with precise examples of how the liberalization of their telecommunications services industry can be beneficial to them.

Moreover, among the Members who have taken commitments, their coverage in terms of subsectors is often partial and various types of market access limitations have been listed in the schedules of commitments.[26] It is important to note some differences between developed and developing countries' commitments. For instance, all industrial countries have taken commitments on basic telecommunications and on most value added telecommunications

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[24] William Drake, "Assessing the WTO Agreement on Basic Telecommunication"s in Gary Clyde Hufbauer and Erika Walda (eds), idid.

[25] Peter F. Cowhey, "The international telecommunications regime: the political roots of regimes for high technology", International Organizations, vol.44, no 2, Spring 1990, p.177.
International relations theory defines regime as set of principles, norms, rules and decision-making procedures designed to reduce coordination problems. Regime change occurs when norms and principles change.

[26] WTO council for Trade in Services, Telecommunications Services: Background Note by the Scretariat, 8 December 1998.

services. The types of market access limitation also vary: developing countries are more likely to have maintained limitations on the number of suppliers and on the type of legal entity which can provide services. However, limits on foreign equity participation are almost as frequent in developed as in developing countries commitments. Further analysis and consultation are required to identify the main market access barriers faced by Canadian firms wishing to offer telecommunications services abroad.

3.3 Enforceability of the Reference Paper

Some institutions are now examining the Reference Paper to see if could serve as a model to address regulatory and competition issues in other sectors.[27] As mentioned earlier, regulatory measures are regarded as one of the main obstacle to trade in services and the multilateral trade regime is still not sufficiently tooled to address this kind of market access problems. The strategy used for addressing domestic regulation as a trade barrier in telecommunications services was to encourage a certain level of harmonization by establishing sectoral guidelines or principles.

However, before using the Reference Paper as a model for other sectors, some preliminary questions should be raised. An important issue is the enforceability of the Reference Paper in WTO dispute settlement proceedings. Some aspects of the document raise concerns, given the lack of precision. One possible path to address the perceived need for more precision is to revise the text of the Reference Paper to put the principles it includes in more explicit language. However, as discussed in the evaluation's section, this option has to be considered in the light of the benefits of the regulatory flexibility allowed by a less precise document. Moreover, it has been suggested that the legal status of the Reference Paper need to be strengthened, i.e. the RP should be included in the GATS itself instead of being included as an additional commitment in national schedules.

The question of the enforceability of the RP requires further analysis which is even more pressing as many countries and organizations begin to seriously look at it as a model for setting regulatory principles in a multilateral trade system.

4. Implementation of the Reference Paper

Before engaging in new liberalization in telecommunications services, implementation of the current agreement by our major trading partners needs to be evaluated. In particular, an examination of the implementation of the commitments on regulatory principles set out in the

[27] See OECD, Implications of the WTO Agreement on Basic Telecommunications. Joint Group on Trade and Competition, 1999.

Reference Paper should be undertaken. The remaining sections of this paper focus on the implementation of the RP in Canada, the United States and the European Union.

4.1 Canada

Until the 1990s, the provision of telecommunications services in Canada was mostly based on regional monopolies. Except for some exceptions (such as in Saskatchewan), these companies were owned by private interests, until 1998, these regional monopolies, such as Bell Canada or BC Tel, were members of a national association, Stentor, which represented the incumbents. Overseas communications were also provided by a monopolist, Teleglobe Canada. The federal regulator, the Canadian Radio-Television and Telecommunications Commission (CRTC) was responsible for supervising the industry, so that the monopolists would not take advantage of their position by charging excessive telecommunications rates and offering poor service to remote regions.

In recent years, the Canadian telecommunications landscape has been subjected to great transformations. The transition from monopoly to competition in the provision of telecommunications services is at the heart of this transformation and has entailed important changes in the legislative and regulatory environment. Competition existed in some market segments (such as private lines), but the first important liberalization measure came in 1992 when the regulator allowed competition in the long-distance telephone market. Two years later, in its decision 94-19, the Commission declared that competition in the local telephony market was also desirable.[28] The following sections will consider how Canadian regulation and legislation comply with the five main elements of the RP.

a. Competitive safeguards

In Canada, the incumbents provide both long-distance and local telephone services and therefore, the risk of cross-subsidization is real. We will see in the next section that the united States opted for structural separation rather than competitive safeguards in order to prevent this. The CRTC's telecom Decision 97-98 includes safeguards to ensure that the incumbents can not engage in anticompetitive practices such as the imputation test which requires that rates for each services offered by the incumbents be sufficient to recover its costs.[29]

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[28] WTO Council for Trade in Services, Telecommunications Services: Background Note by the Secretariat, 8 December 1998.

[29] The CRTC has adopted other measures to ensure that the new entrants can effectively compete with the incumbents. The incumbents must continue to provide telephone directories (white pages) with complete listings, including the subscribers of their new competitors (Section 11, Decision 97-8). (In Decision 95-3, the CRTC also demanded that the incumbents provide listing of their residential subscribers to the new entrants.) The incumbents must also give access to their databases for directory assistance's purpose. Another competitive safeguard found in CRTC regulations is the ban on exclusive arrangements between local and long-distance service providers. A

When adopting the RP, the WTO Members accepted the general responsibility of maintaining measures to prevent "major suppliers from engaging in or continuing anticompetitive practices." In order to respect this commitment, Canada can rely on its Competition Act, enforced by the Director of Competition with the help of the management and staff of the Competition Bureau. In recent years, the Director and the Bureau have been quite active in the telecommunications sector. For instance, the Director has made submissions in the CRTC public hearings and influenced the rules the CRTC adopted in terms of determining what is "market power." The Bureau has also investigated acquisitions and business practices to ensure that the incumbents do not adopt anticompetitive behaviours.[30] However, some critics have argued that the Director and the Bureau of Competition do not have sufficient resources in order to address the increasingly important role they should play, as competition law will slowly replace (or in many cases, be juxtaposed on) direct regulation.[31]

b. Interconnection

In general, the CRTC's position has been not to rely extensively on commercial negotiations between telecommunications providers as the main way to secure interconnection agreements. Instead, the Commission is of the view that co-location and unbundling tariffs should be established through the regulatory process, as negotiated solutions between telecommunications suppliers have not been successful in the past.[32] The proceedings which resulted in the decision 97-8 aimed at establishing the modalities of interconnection.

The CRTC rulings and Canadian legislation on telecommunications regarding interconnection respect the WTO commitments taken in the Reference Paper. The RP requires that interconnection be provided under nondiscriminatory terms and conditions. Accordingly, the Telecommunications Act of 1993 prohibits carriers "from unjustly discriminating or giving undue or unreasonable preferences to any person, including itself, in the provision of telecommunications services." The RP also requires interconnection to be provided on a sufficiently unbundled basis, so that the new entrants should not have to pay for facilities,

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subscriber to an incumbent's local service is free to keep the incumbent long-distance service or to change to a competitor (the same applies to new entrants). Moreover, the CRTC fixes the price of some essential facilities that the new entrants need to lease from the incumbents, so that the latter cannot use its dominant position to overcharge for its services.

[30] For example, The Bureau reviewed "the 1993 reorganization of the Stentor Alliance, the national telecommunications network comprised of Canada's nine regional telcos. After an extensive three-year examination, the Director concluded that he did not have the grounds to challenge Stentor under the Competition Act. He referred to evidence of competitive entry into long distance markets and the significantly declining rates charged for long distance service as important factors in this decision." Calvin Goldman and Richard Corley,

[31] For a discussion advocating for a greater role of competition policy in telecommunications but stressing the limited resources of the antitrust agency in Canada, see W.T. Stanbury, "Competition Policy and the Regulation of Telecommunications in Canada", in Stanbury (ed), Perspectives in the New Economics and Regulation of Telecommunications, Montreal, IRPP, 1996.

[32] CRTC Telecom Decision 94-19, section E.2, 1994.

components or services they do not desire. The Commission mandated unbundling of *essential facilities* and generally recognized the need for unbundling.[33]

The Reference Paper also mandates that interconnection be provided at any technically feasible point in the network. However, the CRTC mandates that interconnection be done at one single point designated as a gateway.[34] Even though the selection of the gateway location is left to negotiations among the parties after recommendations from the CRTC Interconnection Steering Committee, there is some uncertainty whether this is in full compliance with the RP.

Finally, as the CRTC rules on interconnection are published in its decisions and based on public consultations, Canada respects the RP requirement of transparency of interconnection agreements and public procedures of negotiations. Indeed, the rules for participation in the Commission proceedings are publicly available and all parties have to right to be involved in that policymaking process. The results of these proceedings are made publicly available and the interconnection requirements apply to all.

c. Universal service

The third regulatory element addressed by the RP is universal service. In Canada, historically, universal service meant that the telephone companies kept basic local residential services at rates below costs by charging high rates for long-distance and business services and more recently, high rates on optional local services. In order to bring prices closer to costs, the CRTC allowed the local exchange carriers to increase their monthly rates for basic local service against a decrease in long-distance rates (decision 94-19). This "rate-rebalancing" raised concerns about the future affordability of telephone service. In its decision 97-8, the CRTC addressed this issue and mandated all providers of long-distance services to contribute to a central fund which will subsidize the provision of local residential service by any local exchange carriers, including new entrants. The choice of a central fund meets the RP requirement as it

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[33] A facility, function or service is considered essential if it meets three criteria 1) it is provided on a monopoly basis, 2) new entrants need it as an input to offer their services 3) new entrants cannot duplicate it economically or technically. The CRTC identified only three services which meet all the criteria: central office codes (the first 3 digits of the 7-digit telephone number), subscriber listings and local loops in certain areas. Decision 97-8 also includes additional conditions regarding interconnection, e.g., carriage of 800 numbers, notification of network changes, etc. Finally, even more specific requirements for interconnection such as numbering are worked out in a CRTC and industry working group, the CRTC Interconnection Steering Committee (CISC).
"In Decision 94-19, the Commission concluded that the unbundling of telephone company networks into discrete components would enable competitors to mix their own facilities with those of the telephone companies in the most efficient manner, and thus stimulate the development of competition in telecommunications. [In the proceeding for decision 97-8] most parties submitted that without mandatory unbundling of essential facilities,competition will not be possible in local telecommunications markets. Such unbundling reduces the extent to which competitors are required to make prohibitively large capital investments to enter the market. CTRC, Telecom Decision 97-8, paragraphs 66-67.

[34] CRTC, telecom Decision CRTC 97-8, P.7, paragraphs 31-32.

makes contributions and attributions more transparent and ensures that the process does not favour one party over another (competitively neutral).

d. Licensing criteria

In Canada, there is no licence per se required for providing domestic telecommunications services. However, Canadian carriers must comply with a tariff filing procedure. They must file tariffs which have to be approved by the CRTC. The tariff-filing process is a public one and is subjected to clear specific rules in terms of delay and procedures. [35] The criterion for approval is that the rates charged by the carrier are just and reasonable. The RP's regulatory principles regarding licensing criteria (public availability, time period, justification for refusal) are therefore respected in the Canadian regulations.[36]

The situation in international communications is different from domestic services. Before the ABT, Canada still had monopoly providers for international services. However, Canada committed itself to remove the remaining monopolies in the telecommunications sector. The monopoly of Teleglobe Canada ended in October 1998 and the exclusive rights of Telesat Canada in certain satellites services will be lifted in March 2000.

With the end of the Teleglobe monopoly on overseas telecommunications services, the CRTC instituted a licensing system for international telecommunications services (Decision 98-17). The granting of licence for international services to Canadian and foreign carriers by the CRTC will depend on the licensee's respect of one main condition: not to engage in anticompetitive conduct.[37] Some reporting requirements are attached to the licence, in order to be able to detect anticompetitive behaviours. In comparison to the American case which will discuss in the next section, the Canadian licencing process for international service is very general and does not contain many specific conditions. It is quite a light-handed regulation and may raise questions of its sufficiency to address
the risks of anticompetitive conducts.[38]

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[35] The Telecommunications Act (Part 3) stipulates the Commission must either approve or disallow the tariff within 45 business days after a tariff is filed by a Canadian carrier. If not, it must provide the reasons for the delay and the period of time within which the Commission intends to act.

[36] The CRTC can decide to forbear its regulatory power for certain types of services or suppliers. Indeed, the Telecommunications Act of 1993 (article 34) allows the Commission to refrain from regulating some segments of the industry if it considered that it would be consistent with Canadian telecommunication policy. The CRTC has already taken advantage of the forbearance provision and ended its regulation of rates in sectors such as long-distance services and most private line services. McCarthy Tétrault Telecommunications Practice Group, Entry into Canadian Telecommunications Markets - The New Rules, October 1998, p.7.

[37] "For the purpose of this condition, anti-competitive conduct includes entering into or continuing to participate in an agreement or an arrangement that has or, is like to have, the effect of lessening competition unduly in Canada, or otherwise providing telecommunication services in a manner that has, or it likely to have, the effect of preventing or lessening competition unduly in Canada". CRTC Telecom Decision 98-17, para. 316.

[38] See McCarthy Tétrault Telecommunication Practice Group, Idem, p.10.

e. Independent regulator

In terms of the regulator's independence, the CRTC institutional position is in compliance with the Reference Paper. The CRTC is separate from and not accountable to any supplier of telecommunications services. The Government of Canada no longer has ownership interest in telecommunications services suppliers. Teleglobe Canada was privatized in 1987 and Telesat Canada in 1992.

However, questions could be asked about the compliance of Canada with the impartiality requirement.[39] The federal Cabinet has some power to review the regulator's decisions when it deems appropriate. The potential lack of impartiality of the Cabinet override process and the lack of transparency of such an appeal process have been underlined by some analysts. The Cabinet's power to revise CRTC's decisions has been limited by recent changes to the legal framework, but the status of a Cabinet appeal in terms of international law remains uncertain.[40]

f. Conclusions

All segments of the Canadian market for telecommunications services market are now open for competitors or are soon to be. Competition is replacing monopoly and the conditions necessary to ensure that the incumbents are not preventing the entry of new providers have been put in place. Therefore, the Canadian legal and regulatory framework concerning telecommunications services conforms to the Reference Paper.

Moreover, it is important to note that the Agreement on Basic Telecommunications will not affect the limits on foreign ownership of Canadian telecommunications firms, as Canada did not commit to any change to the general rules. The rules on Canadian ownership in the facilities-based telecommunications services industry are the following: foreign ownership is limited to 20% direct investment and 33.3 % indirect investment, the cumulative foreign investment therefore not exceeding 46,7 %. These limits do not apply to resellers and enhanced-service providers.[41]

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[39] The Reference Paper specifies that "The decisions and the procedures used by the regulators shall be impartial with respect to all market participants."

[40] See Hudson Janish, "International Influences in Communications Policy in Canada", in Dale Orr and Thomas Wilson, The Electronic Village: Policy Issues in the Information Economy, C.D. Howe Institute, Policy study 32, 1999.

The new Telecommunications Act of 1993 is largely concerned with establishing the policy-making powers and jurisdictions in Canadian telecommunications. Concerning the appeals to Cabinet to review CRTC decisions, a one-year limit on Cabinet override, a requirement for public written petitions filed with the CRTC and a requirement for the Cabinet to provide reasons for its decisions were included in the legislation.
See Hudson Janish, "New Federal Telecommunications Legislation and Federal-Provincial Arrangements", in Steven Globerman and al. (eds), The Future of Telecommunications Policy in Canada, Toronto, UofT Press, 1995.

4.2 The United States

The United States has been a forerunner in the liberalization of telecommunications services. Indeed, the introduction of competition in the American telecommunications market long preceded the WTO Agreement on Basic Telecommunications. The long-distance market has been opened for competition since the early 1980s. The incumbent's (AT&T) market share is now at 42.1 percent and strong competitors such as MCI (now merged with WorldCom) and Sprint compete with hundreds of small carriers, making the U.S. the world's most competitive long-distance market.[42] Early competition also existed in value-added telecommunications services (services which included some processing of data) and in customer equipment.

Regarding the regulatory framework for the telecommunications industry, the principles of the Reference Paper regarding competitive safeguards, interconnection, universal service, licensing and regulator's independence are usually respected in American legislation and regulations. The American legislation, the Telecommunications Act of 1996 (Public Law 104-104), preceded the WTO agreement and in fact, provided many of the parameters for the Reference Paper, especially regarding interconnection. In terms of telecommunications policy, the Telecommunications Act performed two tasks. First, it opened the local telephone market to competition. Up to that point, the Regional Bell Operating Companies (RBOCs) held a monopoly over the provision of local telephone service. Secondly, the new law lifted the line-of-business restrictions which were imposed on the RBOCs since the divestiture of AT&T in 1984. According to the new legislation, the Bell companies can now offer long-distance service, once competition is well established in their local market (SEC.271).

The next sections review how the American legal and regulatory framework respects the principles set in the RP, as well as the record of enforcement of this framework. We will see that the idea that actual competition in local telecommunications services would occur only if a series of conditions were met, underlie the drafting of the American Telecommunications Act of 1996.

a. Competitive safeguards

The application of general competition law in the United States is ensured by the Antitrust Division of the Department of Justice (DOJ). The Division has been very active in its enforcement of antitrust law in telecommunications, as the suit against AT&T and the 1982 agreement it resulted in certifies. As a consequence of this legal action, AT&T was forced to withdraw from the local telephone market and seven regional monopolies were created.[43] Such

[42] FCC, Trends in Telephone Service, July 1998.

[43] The judgment specified the restrictions the newly created Regional Bell Operating Companies (RBOCs) had to comply with, in exchange for the benefit of being the monopoly providers of local service in their area. These restrictions concerned the lines of business they were forbidden to enter for fear that their position in the local market would give them unfair advantages. Indeed, one of the main arguments for the divestiture of AT&T was

structural separation to prevent anticompetitive behaviour has not been adopted by other countries. Nevertheless, it showed the US commitment to antitrust enforcement in telecommunications. The RBOCs were kept out of the long-distance business in the Divestiture agreement because it was believed to be the only effective way to ensure that they would not subsidize competitive activities with revenues from their monopoly profits.

The Telecommunications Act of 1996 presents a new strategy in terms of competitive safeguards. It specifies that the RBOCs can now enter the long-distance telephone market, but includes important competitive safeguards against the monopoly power of the incumbents. In order for RBOCs to receive the authorization to enter this previously forbidden line of business, the FCC, in consultation with the Department of Justice and State commissions, must first assess if there is a facilities-based competitor in the local market of the RBOCs who wishes to offer long-distance service. To receive the authorization, the interconnection offered by the RBOCs must also meet a long list of specific requirements (see Annex).

The drafters of the legislation saw the adoption of strict criteria for the authorization of the RBOCs in long-distance as the best strategy to ensure that their monopoly or dominance in the local market would not confer them unfair advantages in the long-distance market. Given these detailed criteria and its strict enforcement by the FCC, it is safe to say that measures are taken in the United States to prevent "major suppliers from engaging in or continuing anticompetitive practices," as required by the RP. Indeed, no RBOCs has been allowed in long-distance yet. Four applications to provide long-distance services in Michigan, Louisiana, Oklahoma and South Carolina have been presented to the FCC in 1997-1998 but they were rejected because the regulator considered that the local markets in question were not sufficiently open to competition and not complying with all the requirements discussed above.

b. Interconnection

The United States has formally respected its WTO commitments in terms of interconnection. The general legal framework in place is in compliance with the RP requirements. The Telecommunications Act of 1996 mandates interconnection, unbundling, co-location, cost-oriented rates in even more detailed fashion than the RP (for detailed description of the provisions, see Annex).

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that the monopolistic control over the local exchange network constituted a "bottleneck," i.e. facilities every provider of telecommunications services must use to terminate their traffic.

Moreover, the creation of local exchange companies independent of AT&T was motivated by the fear of cross-subsidization. As discussed earlier, when a firm has a monopoly in one sector, it can overcharge its customers in that market and use these revenues to lower its price in the competitive markets such as long-distance. By lowering its rates in the competitive markets, possibly even temporarily under costs, this firm can put intense pressures on its competitors. Given these risks, the Antitrust Division insisted that the new RBOCs could neither offer information and long-distance services, nor manufacture telecommunications equipment.

However, the enforcement of specific interconnection provisions poses a difficult problem. Indeed, the responsibility to implement the Telecommunications Act is shared between the Federal Communications Commission (FCC) and each State public utility commission. If the fifty states enforce different interconnection rules, access to the local telecommunications market would be greatly reduced.

However, the new law on telecommunications grants power to the FCC to remove barriers to competition if the State commissions do not allow new entrants in their local market.[44] The FCC took the initiative to provide national standards on how to implement the Telecommunications Act's provisions on interconnection.[45] The proposed national rules for interconnection conditions and prices have been subject to controversy and legal challenges since 1996. Indeed, the State commissioners and the Bell companies challenged in courts the FCC's right to adopt and enforce national rules on interconnection.[46] The RBOCs argued that the proposed guidelines are too favourable to new entrants. The legal battles have definitely slowed down the introduction of competition in the American local phone market. However, in February 1999, the Supreme Court issued its decision supporting the FCC's legal authority to provide national standards.

The attempt by the FCC to "nationalize" the highly fragmented system of the regulation of local telephone service and the recognition by the Supreme Court of its legal authority to do so should be regarded as positive steps for Canadian firms wishing to enter this market. As American long-distance carriers have argued, national rules can persuade the incumbent local-exchange carriers to negotiate with the requesting firms, as the national rules could subject them to less advantageous terms than they would be able to negotiate. Moreover, a certain uniformization is preferred to a patchwork of local regulations. Indeed, national standards "reduce the likelihood of potentially inconsistent determinations by State commissions and courts and burdens on new entrants that seek to provide service on a regional or national basis by limiting their need for separate network configurations and marketing strategies, and by increasing predictability. As a result, [...] new entrants would have a greater access to capital necessary to develop competing services".[47]

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[44] See SEC.253 (d) on the FCC right to preempt State commission.

[45] These national standards identify, among other things, the five minimum technically feasible points at which the incumbents must provide interconnection, the minimum set of unbundled network elements that the incumbent should provide (local loop, local and tandem switches, interoffice switches...) and a pricing methodology to determine the prices new entrants should pay to incumbents. FCC, Implementation of Local Competition Provisions in the Telecommunications Act of 1996, CC Docket no.96-98.

[46] See "High Court to Hear Dispute on Opening Phone Markets", New York Times, January 17, 1998; "Supreme Court will Review Portions of the Telecom Act, Leaving Firms in Limbo", Wall Street Journal, January 27, 1998.

[47] FCC, Implementation of Local Competition Provisions in the Telecommunications Act of 1996, CC Docket no.96-98, part 2, p.2.

c. Universal service

The Section 254 of the Telecommunications Act of 1996 created a federal-state joint board which has to redefine what is universal service and what is the best mechanism to fund it. The section set some of the principles the provision of universal service should be based on. The rates should be just, reasonable and affordable, even if customers live in rural and high costs areas. According to the law, support mechanisms should be specifically targeted and predictable. The contributions made by suppliers to the funding of universal service should be equitable and nondiscriminatory. Moreover, the legislation requires that schools, libraries and health care facilities have access to advanced telecommunications services. In May 1997, the FCC issued a Universal Service Order proposing a plan to fulfill the goals of universal service set in the legislation. The universal service is funded by all telecommunications carriers. About 4% of their revenues are directed to fund low-income customers and for telecommunications services and Internet access of schools, hospitals and libraries. These universal service provisions respect the prescriptions for transparency and nondiscrimination found in the RP.

d. Licensing criteria

In the United States, the provision of long-distance does not require a licence per se, but requires providers to file their tariffs with the FCC. The FCC is also responsible for attributing licences for a variety of wireless communications services. As in Canada, the regulatory process of the FCC is very public and open. FCC decisions including licensing decisions are always made after consultations. Indeed, all parties to a decision can react to the Notice of Rule-Making in which the regulator presents its proposals. The process is quite formal and sometimes criticized as cumbersome. However, there have been efforts at "streamlining" it. As required by the RP, the reasons for the decision are usually made explicit, as FCC decisions are often subject to judicial review.

The sector in which licensing has been most contentious is in international communications. Even though the FCC declared that it has adopted open entry standards for WTO members who wish to enter the market, it kept very detailed rules to prevent the exercise of foreign market power in the American market (see Annex for description of these rules).

The most problematic of these rules relates to the FCC contention that, in some cases, these competitive safeguards may not be sufficient to constrain the potential for anticompetitive harm. " In such instances, the Commission reserves the right to attach additional conditions to an authorization and, in the exceptional case in which an application poses a very high risk to competition that cannot be addressed by safeguards, it reserves the right to deny the authorization."[48] This right to deny an application has been disputed during the FCC public

[48] "Commission liberalizes foreign participation in the US telecommunications market", FCC News Releases, November 25 1997, Report No. IN 97-36.

hearings. Foreign carriers expressed their concern that the definition of "very high risks to competition" is unclear and vague and leaves too much discretion to the FCC.

The FCC can also deny a license for international communications if there are national security, law enforcement, and even more troublesome, foreign policy or trade concerns raised by the Executive Branch. Denial of a license based on national security or law enforcement is consistent with the GATS' provision regarding general exceptions (art.14). However, to allow the FCC to deny a license based on foreign or trade policy concerns does not appear to be in compliance with WTO obligations.

In conclusion, the American regulatory process ensures that, as mandated by the RP, the reasons for denial of a licence are also publicly available. However, the criteria used for the attribution of international communications licences do not appear to comply with RP requirement that criteria be publicly available, as strong elements of uncertainty and discretion have been introduced in the regulatory process.

e. Independent regulators

In the United States, the regulator of telecommunications services, the FCC has been formally independent from suppliers of services since its creation in 1934. The provision of telecommunications has always been under private management. Therefore, the problem linked to the independence of the regulators in countries where the supplier was State-owned is absent from the American political arena. The same applies for the State public utility commissions.

However, there have been allegations by scholars and political actors that the FCC has been "captured" by the private interest it was supposed to regulate. Even though this is a debatable statement, it remains that until the 1970s, the FCC was generally deferential in its treatment of AT&T. It did not challenge the monopoly position of the company, as it was considered the best way to attain affordable and universal service. However, it is fair to say that the FCC is now a supporter of competition, and, with the removal of the ECO test, of entry by foreign competitors.

The State commissions are more reluctant than the FCC to allow competition in the local telecommunications market. The State commissioners are responsible for setting the local rates and they fear that competition will force the rate upward, an unpopular measure in all States. Therefore, they often side with the RBOCs, as it is the case in the recent legal battles. These cautionary remarks should not be interpreted as challenging the independence of the American regulators. The provision of the RP which stipulates that "the regulatory body [be] separate from, and not accountable to, any supplier of basic telecommunications services," is respected.

f. Conclusions

To what extent has the RP been implemented in United States? The principles set forth in the documents were all introduced in the American legal and regulatory framework. In fact, most of the regulatory principles of the RP were in place before the WTO agreement. As mentioned earlier, the Telecommunications Act of 1996 adopted by the American Congress addresses the issues raised in the RP. The Reference Paper was actually included "to address U.S. concerns by ensuring that all signatories create effective competitive opportunities and take it upon themselves to prevent anticompetitive behaviour".

4.3 The European Union

The European Union decided to open all telecommunications services markets to competition starting in 1998. The EU had already liberalized some telecommunications services markets in the early 1990s, the so-called value-added services. However, voice telephony, which represented 80% of industry revenues, was still reserved to the Public Telecommunications Operators (PTO). Historically, these national telecommunications service providers have been State-owned, often entirely integrated into the public administration, sometimes managed as a public corporation.

The end of the national monopoly of the PTOs was announced in June 1993 when the EU Council of Ministers adopted a resolution to remove the formal barriers to entry in voice telephony by January 1st 1998.[49] Apart from the policy which bans legal monopoly in telecommunications services, the European Union has adopted a series of measures in order to implement a common regulatory environment and harmonized standards. These directives are concerned with issues like interconnection, universal service and competitive standards and therefore implement most of the principles set out in the Reference Paper. The next sections will review the EU legislation concerned with the regulation of telecommunications and assess to what extent the principles of the Reference Paper have been implemented in Member States, in particular in Germany, France and the United Kingdom (see Annex for details on European Commission and Member States).

[49] The adoption of the directive 96/19/EC on full competition in 1996 put this decision in concrete form. This piece of legislation allowed Members States with less developed networks to request a longer implementation period (up to 2003) and the Members States with very small networks to demand for up to two additional years to adapt to the competitive environment (article 2 of 96/19/EC). Under these provision, Ireland and Portugal were allowed to defer the liberalization of voice telephony and telecommunications infrastructure until 1st January 2000 and Greece was granted to delay its liberalization until 2001. Directive 96/19/EC of 13 March 1996 amending Directive 90/388/EEC with regard to the implementation of full competition in telecommunications markets.

a. Competitive safeguards

The WTO Reference Paper on basic telecommunications services demands that measures are taken to ensure that major suppliers do not adopt or maintain anticompetitive practices. A major supplier is defined as a "supplier which has the ability to affect the terms of the debate of participation (having regard to price and supply) in the relevant market for basic telecommunications services as a result of control over essential facilities or use of its position in the market."

At the level of the European Union, protection against anticompetitive behaviour is twofold. First, Directorate General IV of the European Commission is responsible for applying European competition law in general and in the telecommunications industry in particular (see Annex for description of the power of the DGIV).The second protection against anticompetitive behaviour in telecommunications services is in the Interconnection Directive. This document specifies that telecommunications organizations with a minimum share of 25% in a given market are considered to have significant market power and are subject to special obligations.[50]

b. Interconnection

The Interconnection Directive adopted by the European Parliament and Council in June 1997 generally respects the principles of the RP.[51] It is a detailed document outlining the responsibilities of Members regarding many aspects of interconnection. In general, the European directive is based on the principle that interconnection should be left to commercial negotiation. Nevertheless, the directive provides many specific rules providing for nondiscrimination, transparency, unbundling, negotiation of interconnection agreements, as well as cost-oriented and publicly available rates. It also stipulates that the National Regulatory Authority (NRA) of each Member States is responsible for ensuring open interconnection to the public telecommunications networks (see Annex for details on the Interconnection directive).

With this detailed document, the EU conforms to the RP provisions on interconnection. The only element of the interconnection directive which raises some concerns is the provision which allows national regulators to limit the obligation of interconnection. Even though the regulator is required to explain publicly the reasons for resorting to this measure, this could be an obstacle to the development of competition.

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[50] For instance, the Interconnection Directive specifies that the telecommunications suppliers with significant market power must keep separate accounting for their activities related to interconnection, in order to prevent cross subsidization (article 8). It also requires suppliers who still enjoy special or exclusive right for the provision of certain services to keep separate accounts of these activities (97/33/EC).

[51] Directive 97/33/EC on interconnection in Telecommunications with regard to ensuring universal service and interoperability through application of the principles of Open Network Provision (ONP).

Moreover, the application of the EU legislation on interconnection in Member States has not been without some problems. New entrants from several countries (Belgium, Germany, France, Italy and Austria) have complained that interconnection negotiations have been delayed by the incumbents. Moreover, in Germany, many elements of the Reference Interconnection Offer have been considered confidential and terms and conditions of interconnection have not been made publicly available. Nevertheless, Reference Interconnection Offers have been filed by incumbents in all Member States (except Greece and Portugal) and the charges for interconnection in Germany, France and the United Kingdom have been within the range recommended by the Commission.

Another problem in the application of the EU legislation in Member States lies in the issue of dispute settlement regarding interconnection agreements. Most national legislation makes regulatory authorities responsible for dispute settlement in case of delayed or blocked negotiations. However, in Germany, the legislation is not specific enough regarding the regulator's power to intervene in interconnection negotiations. (Similar concerns were raised by the European Commission for the situation in Luxembourg, the Netherlands and Belgium).

c. Universal service

The EU legislation, like the RP, recognizes the right of Members to decide if they want to establish a system of contribution to universal service obligations and the right to define the substance of these obligations. It also conforms to the RP in its requirements for transparency and nondiscrimination. Only Italy and France have adopted a system to share the cost of universal service and some concerns were raised about the latter.[52]

d. Licensing criteria

The RP provision regarding licensing criteria is an extension of the transparency principle found in the other WTO agreements. The RP required that the criteria, the period of time needed

[52] The French legislation, the Loi de réglementation des télécommunications adopted in 1996, made the provision of universal service a responsibility of France Télécom (the incumbent supplier whose ownership control still lay in the hand of the State). Universal service obligations include the duty to serve all regions at affordable rates and to provide public telephones and directories. Based on the recommendations of a group of economic experts, the funding of these universal service obligations is managed through a separate fund to which all telecommunications services suppliers must contribute, according to their traffic volume. Some new entrants criticized the system as too favourable to France Télécom. They argued that in conferring the responsibility to deliver universal service to the incumbent, the law ignored the possibility that new entrants may be able to provide less costly and more efficient universal service. Moreover, they argue that the market benefits which accrue to France Télécom as the universal service operator are not taken in account in the calculation of the net cost of universal service. Therefore, it is possible that the financial burden imposed on new entrants constitutes a market entry barrier and not competitively neutral as prescribed by the Reference Paper.

to reach a decision, the terms and conditions of the licence and the reasons for denying a licence be publicly available. The EU legislation conforms to these terms.

The EU Member States adopted a variety of licensing procedures for voice telephony and public telecommunications networks from light procedures to fuller and more lengthy procedures (in Belgium, Spain, Italy and Austria). One measure which has been identified as a potential barrier for new entrants is the high level of licence fees in Germany and in France.[53] Market entry barriers might also arise from the obligations attached to individual licences in France. Specifically, the French legislation conditions the licence for the establishment of public networks and the provision of voice telephony on a certain percentage of investment in Research & Development (R&D) in the telecommunications sector. Despite this potential barrier to entry, licenses to provide national voice telephony services have been granted in almost all EU countries: the UK has already granted more than 30 licences, Germany, 21 and France has issued 24 licences.[54]

e. Independent regulators

In contrast to the United States or Canada, the independence of the regulators in Europe has been a contentious issue. Most EU members did not have a regulatory authority until late in the 1980s or early in the 1990s. The PTOs were the public entities providing telecommunications services as well as the organizations elaborating public policies in that sector. No other entity was responsible for supervising the prices or the practices of the monopolist.

In response to EU recommendations and directives issued in the late 1980s and 1990s, Members States created National Regulatory Authorities (NRAs) which are legally and functionally separate from the operational activities of the operators.[55] However, the procedures for licence attribution in France raises some concerns regarding the independence of the process. Indeed, authorizations for the establishment and maintenance of public telecommunications

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[53] See Communication from the Commission to the Council, the Parliament, the Economic and Social Committee and the Committee of Regions: Fourth Report on the implementation of the telecommunications regulatory package, October 1998, p.17.

[54] Information up-to-date August 1998, Fourth Report on the Implementation of the Telecommunications Regulatory Package, October 1998, p.6.

[55] The first step taken by the European Commission to modify this state of affairs was to recommend the separation of operational activities from the regulatory functions in its 1987 Green Paper. The second step was the adoption in 1997 of a directive instructing that National Regulatory Authorities (NRAs) should be legally distinct and functionally independent of all organizations operating in telecommunications services or equipment markets. Moreover, national governments which still own or control corporations providing telecommunications services have to guarantee the effective structural separation of the regulatory function from activities associated with ownership or control. Directive 97/52/EC of October 1997 amending Council Directive 90/387/EEC and 92/44/EEC for the purpose of adaptation to a competitive environment in telecommunications.

network are granted by the Minister responsible for telecommunications (Secrétaire d'État à l'industrie), and not by the independent regulatory agency. Given the ownership control of France Télécom by the French government, the potential risks of bias have to be emphasized.[56] The European Commission expressed similar concerns about Belgium, Finland, Luxembourg and Ireland.[57]

f. Conclusions

This overview shows that the European Union authorities have, through the adoption of numerous directives, implemented the principles of the RP. Moreover, the transposition of these measures by Member States in their national frameworks is, in most cases, in agreement with the regulatory principles found in the RP. The cases which pose problems have been mentioned in the preceding sections. France and to a lesser extent, Germany, have adopted some regulatory practices which raise concerns, but the United Kingdom seems to conform to the regulatory principles set forth in the WTO document.

4.4 Japan

Until the mid-80s, the provision domestic telecommunications services in Japan was under the responsibility of one public corporation, the Nippon Telegraph and Telephone Public Corporation (NTT), and international telecommunications were supplied by a government-regulated corporation, Kokusai Denshin Denwa (KDD). Through various reforms in the 1980s and 1990s, competition was allowed in the provision of telecommunications services and NTT was partially privatized. Moreover, partial deregulation took place and the line-of-business restrictions limiting NTT to the domestic market and KDD to international services, were lifted. We will examine the results of these reforms and how the new Japanese regulatory framework complies with its WTO commitments.

a. Competitive safeguards

In Japan, the incumbent, NTT, offers a large range of services: long-distance, local, mobile, etc. Given the risks of cross-subsidization and the market power of NTT which still control more than 99% of the local fixed lines markets, the issue of competitive safeguards is crucial.[58] However, the Japanese agency responsible the competition policy, the Fair Trade Commission (FTC) has not been active in telecommunications services. This lack of

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[56] The Secrétariat d'État à l'industrie is part of the Ministry of Economic Affairs, Finance and Industry which is responsible for the management of the State's shareholding in France Télécom.

[57] The Secrétariat d'État à l'industrie is part of the Ministry of Economic Affairs, Finance and Industry which is responsible for the management of the State's shareholding in France Télécom.

[58] The domination of NTT is less strong in the other segments of the market.

involvement of the competition authority can cast doubts over the capacity of Japanese authority to make sure that major suppliers do not engage in anti-competitive practices.

We saw earlier that the policy option adopted by American authorities to deal with the issue of dominance of the incumbent was the divestiture of AT&T. The Japanese authorities have also contemplated the possibility of breaking-up NTT over the last years. A decision announced in March 1997 by the Japanese government indeed divides NTT into one long-distance company and two regional companies for regional services.[59] However, the three new entities will be under one holding company which led some doubting the effectiveness of this division. "The break-up will be less effective in promoting local competition because of the holding company structure. It is unlikely that NTT East and West will be involved in infrastructure competition, given that it is not in the shareholders' interests for the holding company to allow NTT East and NTT West to enter each other's market. In addition, under the NTT Law, NTT East or NTT West cannot enter long distance markets."[60]

b. Interconnection

The Reference Paper includes many provisions concerning interconnection. One of them specifies that interconnection rates should be cost-based addresses the main concern raised by private actors in the telecommunications services markets in Japan: the high prices charged by the incumbent (NTT) for interconnection (for a comparison of NTT's interconnection rates with other OECD members, see OECD, 1999, Regulatory Reform in Japan). The OECD raised other problems concerning the pricing of interconnection in Japan. The "network modification charges" demanded by NTT to connect a new entrant to its network are not standardized, which can lead to non-transparent and discriminatory conditions of interconnection. Moreover, NTT demanded charges that were considered unreasonable for some unbundled services such as directory services inquiries.

Some problems also rose from technical requirements demanded by NTT to the new suppliers asking for interconnection. For instance, NTT sets the minimum international interconnection speed at very high level (52 mbps). The traffic of smaller suppliers does not require such speed. One could propose that this technical requirement does not comply with the provision that the supplier needs not "pay for network components or facilities that it does not require for the service to be provided."

The Reference Paper requires that interconnection be provided on non-discriminatory terms and condition in addition to be at cost-oriented, reasonable and transparent rates. The Japanese legislation formally grants to the regulator, the Ministry of Posts and

[59] Law concerning Nippon Telegraph and Telephone Corporation, Law no.85 of December 25, 1984 as amended by Law no.98 of June 20, 1997.

[60] OECD, Regulatory Reform in the Telecommunications Industry, chapter 6, 1999, p.10

Telecommunications, the responsibility of ensuring that interconnection agreements respect these conditions.[61] Interconnection agreements must receive the authorization of the MPT; therefore, the regulator has the legal authority to respond to potential abuses from the dominant supplier. However, the issue remains the application of this authority.

c. Public availability of licensing criteria

The Reference Paper specifies that when a licence is required, all the licensing criteria should be made available. However, the Japanese regulatory agency, the Ministry of Posts and Telecommunications (MPT) has large discretionary powers in the granting of licences. A licence is required for telecommunications services providers which own infrastructures. However, the criteria for granting the permission are very broad.[62] The absence of specific and clear criteria for obtaining this licence results "in a pre-negotiation process whereby new entrants determine whether or not an application once made, would receive favorable treatment from MPT. This unofficial procedure implicitly suggests that, unless MPT is satisfied with the application, companies will not be able to file an application".[63] This process causes delays, uncertainties and a lack of transparency and does not comply with the requirements of the Reference Paper. We can note that this situation is not unique to telecommunications, as Japanese administrative and regulatory procedures have been described as often non-transparent and lacking openness.[64]

d. Universal service

There is presently no universal service fund in Japan but there are discussions on that issue. As in other countries, universal services obligations are the responsibility of the incumbent, NTT, which traditionally cross-subsidize high-costs services with low-costs areas. As mentioned earlier, entry of competitors challenges this redistributive system.

e. Independent regulator

The Japanese government still owns the majority of the shares of NTT which creates a concern regarding the independence of the regulator, the Ministry of Posts and Telecommunications (MPT). While MPT argues that NTT shares belong to the Ministry of Finance and not MPT, there is concern over a potential conflict of interest, since the government

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[61] Telecommunications Business Law, article 38.

[62] Telecommunications Business Law, article 38.

[63] OECD, Regulatory Reform in the Telecommunications Industry: Japan, 1999, chapter 6, p.22. See also Steven Vogel, Freer Markets, More rules: Regulatory Reform in Advanced Industrial Countries, Ithaca, Cornell University Press, 1996.

[64] OECD, Regulatory Reform: Country Review of Japan, 1999.

is at the same time an owner of NTT and the regulator of the telecommunication sector (both MPT and the Ministry of Finance) are under the responsibility of the Prime Minister).[65]

f. Conclusions

The overview of the implementation of the ABT's Reference Paper in Japan reveals several problems in the regulatory framework for telecommunications services and its application, especially regarding interconnection. It remains to be seen if the existing problems will be solved through exchanges and discussions among WTO members or if the option of the dispute settlement procedure will be selected. The table below provides a portrait of the potential problems to be addressed in Japan and the other Quad countries. We should note that the level of implementation in these four countries may not be reached by all WTO Members, especially not in emerging economies.[66] A broader review of the implementation of the ABT may therefore be very useful.

[65] OECD, Regulatory Reform in the Telecommunications Industry: Japan, 1999, chapter 6, p.34.

[66] See EBT-DFAIT, Market Access for Basic Telecommunications Services in 1998: A global Report Card, 1998.

Potential Problems in Implementation of the Agreement on Basic Telecommunications Reference Paper

	Competitive safeguards	Interconnection.	Universal service	Licensing criteria	Independent regulator
Canada	lack of resources of competition authority	----------	--------	----------	Cabinet appeals
USA		need for national rules	---------	vague "foreign policy and trade concerns" criteria for international licences	--------
EU	--------	Delays in interconnection negotiations	France's system may be too favorable to incumbent	High licence fees in Germany and France	Risk of bias given state ownership
Japan	Weak competition authority	High charges for intercon-nection	Discretion ary pre-licencing process	--------	Risk of bias given state ownership

5. Concluding remarks

What are the broader implications of the Agreement of Basic Telecommunications for the multilateral trade system? Two issues appear to be especially salient in regard of the future of trade liberalization: the issue of domestic regulation and the issue of public ownership.

The issue of government ownership strikes at the heart of the compromise between trade liberalization and state sovereignty. The members of the WTO are free to choose to privatize the public corporation which are providing telecommunications services or other types of services. There is no legal obligation on them to change the status of the operator, except regarding the formal independence of the regulator.

However, there has been a shift from the view that telecommunication is a *public service* to be provided by the State, like other infrastructure services (electricity, transportation, post) to the view that these services are *commodities* as any other, can be traded between nations and be subjected to trade rules. This shift challenges the national public policies supporting state ownership of infrastructures. It is feared that the ownership link will grant a public corporation special privileges; for instance, the issue of the independence of the regulator vis-a-vis the state-owned incumbent was raised in this paper. The tension between the freedom of sovereign states to opt for a variety of policy instruments to achieve their goals and the existence of trade rules which somehow challenge the use of certain instruments such as public ownership is clear. However, the Agreement on Basic Telecommunications does not offer a solution to this particular issue.

In contrast, regarding the issue of domestic regulation, the ABT appears to offer a model to deal with that tension. As discussed earlier, the Reference Paper on regulatory principles is an attempt to respect the regulatory autonomy of nation-states while making sure that domestic measures affecting the provision of telecommunications services do not impair trade. The tension between sovereignty and the international trade system will remain and intensify in the next years, as trade commitments will deepen, increasingly affecting national policies. One of the main challenges will be to find arrangements which will perpetuate the equilibrium, the compromise achieved up to now. The legitimacy of the trade system will be based on the respect of state sovereignty, especially in democratic nation-states where the expression of democratic will, and its concretisation through the actions of government, is seen as the main source of political legitimacy.

ANNEX

USA competitive safeguards

Telecommunications Act of 1996 "competitive checklist" includes:

- nondiscriminatory access to network elements
- nondiscriminatory access to poles, ducts, conduits and rights of ways owned or controlled by the RBOCs at just and reasonable rates
- local loop transmission from the central office to the customer's premises, unbundled from local switching or other services
- local switching unbundled from transport, local loop and other services
- nondiscriminatory access to 911 services, directory assistance services, operator call completion services
- white pages directory listings for customers of other carriers
- nondiscriminatory access to telephone numbers
- nondiscriminatory access to databases and associated signalling necessary for call routing and completion
- number portability
- nondiscriminatory access to services or information necessary for local dialling parity
- reciprocal compensation arrangements
- telecommunications services available for resale.

Moreover, the RBOCs are required to provide their non-local services through a separate affiliate (see Section 272). As this "competitive checklist" indicates, the competitive safeguards of the Telecommunications Act are very detailed and specific.

USA interconnection

Sections 251 and 252 of the Telecommunications Act of 1996 provide for the interconnection of new entrants to the public telephone network. The elements specified in the RP are found in the American law. First, all telecommunications carriers must interconnect with the facilities of the other carriers. The incumbent local exchange carriers (named "major suppliers" in the RP) have to meet additional requirements. They cannot discriminate against resellers, they must provide number portability, dialling parity and access to rights-of-way (ducts, poles). The local carriers also have to offer access to network elements on an unbundled

basis and allow physical or virtual collocation of equipment necessary for interconnection.[67] In this manner, the Telecommunications Act is more specific than the RP.

The Telecommunications Act also includes provisions about the negotiation of interconnection arrangements between telecommunications carriers and the dispute settlement process to follow in case of the failure of negotiations. The local carriers have the duty to negotiate in good faith with carriers requesting interconnection. At any point of the negotiation, one of the party can ask the State commission to participate and mediate differences. If the parties reach an agreement, they must submit it to the State commission for approval. If the negotiations are stalled, one of the party can petition the State commission for compulsory arbitration. As required by the Reference Paper, the determination of interconnection price by the State commission must be based on costs. If a State commission fails to carry out its responsibility in terms of approval, mediation or arbitration of interconnection arrangements, the FCC can take over and assume these responsibilities (Sec.252 e) (5)).

USA Licensing criteria

Providers of international services need to obtain a Section 214 authorization from the FCC before offering their services to American customers. Since 1997, foreign providers members of WTO do not have to meet special requirements for such authorization anymore. Indeed, in November 1997, the FCC abolished the use of its Effective Competitive Opportunity (ECO) Test for WTO-members. (The ECO test remains for non-WTO members.) This test was first introduced in 1995 and consisted in forcing foreign carriers who wanted to offer international facilities-based, resold switched and resold non-interconnected private lines services to American customers to demonstrate that their home markets were open to American telecommunications firms. Only Britain, Sweden and New Zealand had passed the test in 1997.[68] The Foreign Participation Order adopted in 1997 stipulates that the ECO test should not be applied to applicants from WTO Members.[68] Moreover, the order removed the ECO requirement for foreign applicants wishing to exceed the 25% indirect foreign ownership benchmark for wireless licence or receive submarine cable landing licenses.

In lieu of the ECO test, the FCC adopted open entry standards coupled with regulatory safeguards to prevent the exercise of foreign market power in the American market. The FCC explained that its greatest concern was that foreign telecommunications firms can exert market power in an input market, i.e. the foreign end of a U.S. international route. The FCC generally defines market power as the capacity of a firm to raise prices by restricting its output of services.

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[67] Collocation allows competitors to locate their own transmission equipment in the local carrier's central office. 25 "FCC to open phone market to foreigners", The New York Times, November 25 1997.

[68] FCC, Report and Order in the matter of Rules and Policies on Foreign Participation in the U.S. Telecommunications Market, IB Docket no.97-142, November 25, 1997.

This can be accomplished in two ways. "First, a carrier may be able to raise service prices by restricting its output of that service; second, a carrier may be able to raise prices by increasing its rivals' costs or restricting rivals output through the control of an input that is necessary for the provision of a service."[69] The need for domestic carriers to use the network of foreign carriers to terminate their international calls is an example of the second type of anticompetitive risks.

In the case of international telecommunications, the FCC believed that the reliance on antitrust laws was not sufficient to prevent these anticompetitive risks and therefore, adopted various measures to guarantee competition and consumer protection. The first safeguard consists in maintaining, although to lesser scope, the "No Special Concessions"rule. This regulation prohibited all American carriers from entering into exclusive arrangements with any foreign carrier. The Order on Foreign Participation narrows this rule to exclusive arrangements with foreign carriers that possess market power at the foreign end of a U.S. international route. Market power is defined as having a market share equal to or greater than 50% in the relevant market.

The Order on Foreign Participation in the U.S. Telecommunications Market also stipulates a series of additional conditions applying only to "**affiliated carriers**," defined as U.S. and foreign carriers with a significant ownership affiliation (more than 25% ownership). The first safeguard was presented in a previous Order, the Benchmarks Order, in which the FCC decided that an affiliated carrier should be authorized to provide facilities-based switched or private lines services to its affiliate only if the benchmarks established by the FCC for settlement rates are respected.

Settlement rates are the per-minute fees paid by a domestic carrier to a foreign carrier for terminating an international call. In 1997, the FCC published the Benchmarks Order which unilaterally set standards for settlement rates paid by US carriers.[70] It argued that the settlement rates were artificially high and that this created a very problematic situation for the United States.

> "Because rates [for international long-distance services] in the United States are lower than in many countries, a substantial amount of world traffic is routed through the United States. The traditional settlement rate system assumes that a customer's physical location determines the place of origin of an international call, with the carrier in the originating country paying a settlement rate to the carrier in the terminating country. However, service innovations such as call back allow customers to change the originating country for settlement purposes. The result is that many more calls are originated for settlement purposes from countries like the United States [..] Partly as a result of these traffic routing patterns, the U.S. settlement deficit continues to grow steeply."[71]

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[69] Ibid., p.60.

[70] FCC, Report and Order in the Matter of International Settlement Rates, IB Docket No.96.261, August 17, 1997.

[71] Ibid., p.7.

Therefore, the FCC unilaterally set lower settlement rates and used the new rates as a condition for authorization. If a U.S.-licensed carrier wants to settle telecommunications services with an affiliated foreign carrier, it cannot settle at a level higher than the benchmark rates in order to receive authorization. This safeguard aimed at reducing the risk of predatory price squeeze, i.e. to price the service below its imputed costs when providing it to its affiliate. This condition does not apply to resale service.

Some WTO members criticized the benchmark condition as violating the GATS. In their comments during FCC hearings, some argued that it constitutes a pre-entry restriction and creates a barrier to entry to the American market (market access). Other contended that it violated the national treatment principle because it is directed at foreign carriers.[72]

A second set of safeguards applies to affiliated carriers and are set out in the 1997 Order on Foreign Participation. The FCC modified the competitive safeguards applying to U.S. carriers classified as dominant due to an affiliation with a foreign carrier that has market power in a relevant market. These new rules "replace the fourteen-day advance tariff filing requirement with a one-day notice requirement and accord these tariff filings a presumption of lawfulness, remove the prior removal requirement for circuit additions and discontinuances, require a limited form of structural separation between a U.S. carrier and its foreign affiliate, retain the quarterly traffic and revenue reporting requirement" (p.100, Order FCC 97-398). Other reporting requirements concern the maintenance of the services provided by foreign affiliates and circuit status. In its early notice of rule-making, the FCC had proposed to ban exclusive agreements regarding joint marketing, customer steering and the use of foreign market customer information. However, the Commission finally decided against this idea.

EU: The Commission and Members States

Once the European Parliament and the Council adopt a directive proposed by the Commission, the national government of each Member States has to transpose the European directive into national law. The European Commission closely supervises the transposition process: the Members States have to notify the Commission of the measures they adopt to implement EU's directives and if the Commission assesses that the transposition is deficient (or if there is failure to transpose), the Commission can take infringement proceedings. Bilateral meetings with representatives of Members States were also organized to examine the state of progress in transposition and conformity of the measures adopted regarding the liberalization and the regulation of the telecommunications industry. The Commission actually published four progress reports presenting the results of its inquiries.[73] This supervision and enforcement of

[72] Ibid., p.80-81.

[73] The most recent one is : Communication from the Commission to the Council, the Parliament, the Economic and Social Committee and the Committee of Regions: Fourth Report on the implementation of the

Members States' practices by the Commission may not be a guarantee of compliance, but at least provides transparent information about the degree of implementation. Moreover, the Commission is active in ensuring that efforts are made to correct the faulty situations.

EU competitive safeguards

The legal authority of the DGIV to enforce antitrust rules is based on articles 85, 86 and 90 of the European Community Treaty. Article 85 prohibits industry agreements, decisions or concerted practices which have as their object the restriction or distortion of competition within the EU market. Article 86 prohibits abuses by "undertakings of a dominant position" within the common market. Whereas these provisions are concerned with the private firms, article 90 deals with the Members States's public corporations or corporations to which the States grant exclusive or special rights. The competition rules apply to these corporations as long as their application does not prevent the organization from accomplishing their the role and mission.

In 1991, the Competition Directorate-General published guidelines for the application of competition rules in the telecommunications sector.[74] These guidelines confirmed that the articles 85 and 86 apply to the European providers of telecommunications, even though many of them are owned by the State or are part of the public administration and represent their Members State in international organizations. As the antitrust rules apply to them, the Commission can challenge agreements or concerted practices if they restrict competition in the telecommunications sector. Similarly, if major suppliers, i.e. the organizations which previously held a monopoly over the provision of telecommunications services, abuse their dominant positions, the Commission can challenge them in the European Court of Justice. The potential abuses listed in the 1991 document are restrictions of access and use, discriminatory provision of service (regarding the price or the quality of the service), and cross-subsidization. In March 1998, the Commission adopted complementary guidelines to take into account the need to clarify the relationship between access agreements and competition law.

EU interconnection

The EU's directive contains an obligation for the incumbent telecommunications providers to negotiate interconnection agreements when requested by new entrants (article 4). However, the national regulatory bodies have the right to temporarily limit this obligation to negotiate on the grounds that there are alternatives to the requested interconnection or that the demand for interconnection is "inappropriate in relation to the resources available." Suppliers with significant market power (+25%) have to meet "all reasonable requests for access to the

telecommunications regulatory package, October 1998.

[74] Guidelines on the application of EEC competition rules in the telecommunications sector, (92/C233/02), OJ C233, 06.09.1991.

network including access at points other than the network termination points offered to the majority of end users (Article 4.2)." The directive is similar to the RP in that it specifies that the charges for interconnection be sufficiently unbundled so that the applicant does not need to pay for network components that it does not want (article 7.4).

As required by the RP, the directive provides for nondiscrimination and transparency of interconnection conditions (article 6). The organizations responsible for the public telecommunications network have to "apply similar conditions in similar circumstances to interconnected organizations [...] and provide interconnection facilities and information to others under the same conditions and the same quality as they provide for their own services, or those of their subsidiaries or partners." All necessary information and specifications must be publicly available and interconnection agreements inspected by the regulatory agency of the country. The rates for interconnection must also meet a list of requirements (article 7):

- must be nondiscriminatory and cost-oriented (the provider of interconnection must prove that the charges are derived from actual costs)
- *must be published in a reference interconnection offer* which describes the interconnection tariffs for various components (charging different tariffs to different organizations must be justified to the National Regulatory Authority (NRA) as not "competition disturbing"; the NRA is also responsible for making sure the reference interconnection offer is published)
- must use suitable cost accounting systems (the NRA is responsible for ensuring that the cost accounting system information provided by suppliers describe the cost standard used, the costs elements included in the interconnection tariffs, the degree and methods of cost allocation and the accounting conventions used, see Annex 5).

The directive also sets the general principles the NRA should follow in the exercise of interconnection responsibilities. The regulatory agency is responsible for dispute settlement when the parties to an interconnection negotiation cannot reach an agreement (article 9.5). The directive recommends that NRAs adopt ex ante rules concerning:

- dispute resolution procedure
- the publication of interconnection agreements
- the provision of equal access and number portability
- the maintenance of "essential requirements" (network operations in case of a catastrophe, maintenance of network integrity and interoperability, protections of data, see article 10)
- facility sharing, collocation
- allocation and use of phone numbers
- universal service obligations.

The directive also encourages the inclusion of other elements such as technical standards, location of the points of interconnection, duration and renegotiations of agreements and equal access in the interconnection agreements (see Annex 7, part 2).

EU Universal service

In its directive on full competition (96/19/EC), the EU requires that if a Member State creates a national plan to share the costs of universal service, it should apply only to undertakings providing public telecommunications networks, and must allocate the burden for each supplier according to objective and nondiscriminatory criteria and in respect of the principle of proportionality (article 4.c). Moreover, Member States must present their universal service plan to the Commission to ensure its compatibility with European law.

The directive on interconnection addressed the issue of universal service in more specific terms (article 5). Universal service obligations represent an unfair burden for one provider. The mechanisms used to share the cost of these obligations must respect certain criteria, besides general principles of transparency, nondiscrimination and proportionality.

- The contributions may either be based on a mechanism specifically established for universal service and administered by an independent body or take the form of a supplementary charge added to the interconnection charge.
- The calculation of the cost (if any) of the universal service obligations must be audited and approved by the national regulatory authority.
- The national regulator must ensure that an annual report is published giving the calculated cost of universal service obligations and identifying the contributions made by all the parties.